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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 501

NELSON E. TAYLOR, J. A. WHITE, GEORGE L. SHELDON AND MRS. JOHN HANCOCK,
Appellants (Respondents),

vs.

PERRY W. HOWARD, SR., EDNA E. REDMOND, S. W. BUTLER AND C. T. BUTLER,
Appellees (Petitioners)

PETITION FOR REHEARING

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No. 501

NELSON E. TAYLOR, J. A. WHITE, GEORGE L. SHELDON AND MRS. JOHN HANCOCK,
Appellants (Respondents),

vs.

PERRY W. HOWARD, SR., EDNA E. REDMOND, S. W. BUTLER AND C. T. BUTLER,
Appellees (Petitioners)

PETITION FOR REHEARING

Come now Perry W. Howard, Sr., Edna E. Redmond, S. W. Miller and C. T. Butler, appellees in the above entitled and numbered cause, but hereinafter referred to as petitioners, and file this their joint petition, praying that this Court will grant a rehearing of this cause and of its order entered herein on February 8, 1954, wherein the judgment of the Lower Court was vacated and this cause remanded with instructions to dismiss the complaint, and in support of said petition for rehearing would respectfully show unto the Court the following:

Points Presented and Reasons Why a Rehearing Should Be Granted

An orderly presentation of the matters urged herein in support of the petition for rehearing suggest the following order of discussion:

Point I

CHAPTER 458, GENERAL LAWS OF MISSISSIPPI, 1950, AS CONSTRUED AND APPLIED BY THE SUPREME COURT OF MISSISSIPPI, VIOLATES THE RIGHTS GUARANTEED TO PETITIONERS BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Point II

THE LOWER COURT HAD (AND THIS COURT HAS) JURISDICTION OF THE PERSONS AND OF THE SUBJECT MATTER, AND SUBSTANTIAL FEDERAL QUESTIONS WERE AND ARE PRESENTED, WHICH ARISE OUT OF THE CONSTITUTION OF THE UNITED STATES.

Point III

THE DECISION IN HOSKINS ET AL. VS. HOWARD ET AL., 214 MISS. 481, 59 SO. (2d) 263, DID NOT PRESENT THE ISSUES INVOLVED IN THIS CASE, AND THE PETITIONERS ARE NOT BARRED BY RES JUDICATA NOR ESTOPPEL.

Perhaps the most cogent reason in support of the petition for rehearing is found in the fact that the record of proceedings in the prior case, which has been urged in support of the pleas of *res judicata* and estoppel, have not yet been printed and are not yet before this Court. The orderly method of proceeding in this Court required that the record of proceedings in the Lower Court be printed and submitted to the Court on the merits of this case, and at the time of this Court's order of February 8, 1954, the record had not yet been printed and briefs had not yet been filed on the questions which were considered by the Lower Court and which should constitute the basis of decision by this Honorable Court.

The record in the prior proceeding consists of almost 400 pages and it is within said record that this Court would find the complete justification for the position of these petitioners. This entire record was before the Lower Court and would be of the utmost assistance to this Court in arriving at a fair and just decision of the case on the merits.

Due to the limited time available for the filing of this petition for rehearing under the rules of the Court, various portions of said record, which is on file in this Court but not yet printed, will be referred to. After full consideration of the entire record of proceedings in the prior case, as well as the new evidence presented, and after full consideration of complete briefs on all issues presented, the Lower Court voted unanimously to adopt the position and contentions of these petitioners and to grant them the relief which they sought.

Statement of Facts

Many of the following facts are taken from the prior proceedings, and the indulgence of this Court is requested to the extent that said facts may be considered as properly shown in the transcript of proceedings. None of these facts were available to this Court when it entered its order vacating the judgment of the Lower Court. It is submitted that these facts will be thoroughly shown to the Court in the printed record, if this petition for rehearing be granted. References will be made to the transcript of prior proceedings which, upon the granting of this petition, will be available to the Court in proper printed form for consideration on the merits of the case.

The history of the political situation as it existed in the State of Mississippi at the time of the passage of Chapter 458, General Laws of Mississippi, 1950, is of some importance to the Court. In addition to the facts alleged and shown by the general exhibits admitted in evidence by

stipulation, the Court may take judicial knowledge of the fact that the old line Democrats had met with the disfavor of the National Democratic Party because of certain difficulties which arose in the National Convention of said party in Philadelphia, Pennsylvania, in 1948. The delegates of the Democratic Party to that convention walked out of the convention during its proceedings and returned to the State of Mississippi. The cordial relations theretofore existing between the then leaders of the Democratic Party in this state and the leaders of the National Democratic Party were thoroughly severed. Thereafter, a group of citizens of the State of Mississippi who met with the favor of the National Democratic Party formed themselves into a group which used the name "Democratic" in its designation, but added thereafter the words, "affiliated with the National Democratic Party" (Tr. p. 172 *et seq.*). This group (for purpose of distinction only) will be referred to herein as the "Trumancrats". It had the blessings of the National Democratic Party and was reputed to have such influence in patronage matters in the State of Mississippi (see Job Sale Cases, *United States* v. *Hood,* 343 U. S. 148, 96 L. Ed. 846, 72 S. Ct. 658; *Hood* v. *United States,* 344 U. S. 941, 97 L. Ed. 1367, 73 S. Ct. 832; *United States* v. *Debrow,* 345 U. S. 991, 73 S. Ct. 1134, 97 L. Ed. 1399; *United States* v. *Debrow,* — U. S. —, 98 L. Ed. Adv. Sheet 78). The ability to dispense patronage or influence would carry many privileges as well as many responsibilities, and the "Trumancrats" enjoyed a substantial growth. In fact, the growth was sufficient to provide a challenge to the old-line Democratic leaders of this state (they being referred to herein as the "States Righters" for purpose of identification).

Most of the elected officials of the state were members of the "States Righters", as were the members of the legis-

lature. Governor Fielding L. Wright was then the governor of this state and was a delegate to the National Democratic Convention in Philadelphia in 1948. After the Mississippi delegates walked out of that convention, the States Right movement was born in Mississippi and other Southern states. In fact, Governor Wright became a candidate for Vice President of the United States on the "States Right" ticket and received thirty-eight electoral votes therefor. He was likewise the governor of this state on April 7, 1950, when Chapter 458, General Laws of Mississippi, 1950, was passed.

To thwart the efforts of the "Trumancrats", the legislature, with the blessing of the state administration (witness the signing of the bill by Governor Wright), passed Chapter 458, General Laws of Mississippi, 1950. It is of interest to note in passing that neither the "States Righters" nor the "Trumancrats" were interested by nor concerned with the efforts of either Republican group. The sole purpose of Chapter 458 was to cut the feet of the "Trumancrats" out from under them and to place the "States Righters" as the sole claimant to the Democratic Party label in the State of Mississippi. This fight was characterized by some heated remarks on the floor of the legislature as is evidenced by the writings of William Winter entitled "The Work of the 1950 Session of the Mississippi Legislature," *Mississippi Law Journal,* Volume XXII, page 18, which read as follows:

> "One of the most widely publicized Acts of the session was the so-called 'party supremacy act' which was passed amid rather heated remarks on both sides of the Mississippi political bench."

Further study of the political situation as it existed in this state at the time of the passage of Chapter 458 may be of some assistance to the Court. There were four active

political groups in the State of Mississippi in 1950. These groups and their activities may be briefly summarized as follows:

1. First of all, there was that group which registered fifty minutes after the Act was signed by the Governor, which is referred to as the "States Righters". The application of the "States Righters" showed that it had complied with Section 3107, Mississippi Code of 1942, as amended, and that it had been organized from the "grass roots" up and was entitled to registration under the law (Tr. pp. 145-150).

2. Secondly, there was the "Trumancrat" group which was not in existence prior to the presidential election in 1948 and which had not complied and could not comply with Section 3107, Mississippi Code of 1942, as amended (Tr. pp. 172-185). The only prior organization of this group consisted of notices given in September, 1948, by newspaper publication and by personal letters (Tr. p. 179) which were interpreted by the Attorney General as not complying with Section 3107, Mississippi Code of 1942, as amended (Tr. p. 187 *et seq.*)

3. Thirdly, there existed the "Republican Party of Mississippi" on behalf of which these petitioners filed the complaint herein as a class action. This group had been in existence for many years and had been recognized by the National Republican Committee. It had complied with Section 3107, Mississippi Code of 1942, as amended (Tr. p. 202). It was definitely entitled to register under Chapter 458, except for the fact that, as construed, it must have been first to apply in order to be entitled to use the name "Republican".

4. Fourthly, there was the group represented by the respondents herein and those whom they represent. Although this group was organized in 1928, as the "Independent Republican Party of Mississippi", it changed its name in 1948 by resolution to "Mississippi Republican Party". It alleged a compliance with Section 3107, Mississippi Code of 1942, as amended, and

it was permitted to register under the name "Mississippi Republican Party".

The Republican Party of Mississippi, the party represented by the petitioners, was organized in 1872, recognized in that year by the National Republican Convention, and has continued to be so recognized by every National Republican Convention since.

The Independent Republican Party of Mississippi, the so-called "Lily Whites", was organized in 1928 by the respondent, George L. Sheldon. At the 1948 State Convention of the Independent Republican Party of Mississippi, a resolution was adopted which provided that "from and after the presidential election of November 2, 1948, the name of the Independent Republican Party of Mississippi be and the same was Mississippi Republican Party, the successor to the Independent Republican Party of Mississippi . . ." (Tr. p. 151).

Chapter 458, General Laws of Mississippi, 1950, which is set forth in full in the supplement to the jurisdictional statement filed by the respondents herein, became effective upon approval of the Governor of the State of Mississippi at 9:00 o'clock A. M. on April 7, 1950. Fifty minutes later, on the same day, the Mississippi State Democratic Executive Committee, acting by W. H. Anderson, its Secretary, filed its application for registration of the name "Democratic" with the Secretary of State in order to comply with the provisions of Chapter 458. Ten minutes later the Secretary of State certified that he had registered the name "Democratic Party of the State of Mississippi" to said applicant. (It is important to note that this group which had thus completed its registration was that certain group generally known throughout the State of Mississippi as the "States Righters", which is the party of the vast majority of voters in this state.)

Less than five hours after the approval of Chapter 458 by the Governor, and at 1:55 P. M. on the same day, the respondents (acting by the respondent, J. A. White), applied to the Secretary of State for registration of the name "Mississippi Republican Party", and at 4:20 P. M. on April 11, 1950, the Secretary of State certified that he had then registered the name "Mississippi Republican Party" to said respondents (Tr. pp. 151-153). Subsequent to the filing of their original application at 1:55 P. M. on April 7, 1950, the respondents filed an amended application for registration at 8:35 A. M. on April 10, 1950 (Tr. pp. 154-162). On April 10, 1950, the Attorney General of the State of Mississippi advised the Secretary of State that the party represented by the respondents was entitled to registration and on the next afternoon the Secretary of State advised the respondents that the name "Mississippi Republican Party" had been registered pursuant to their petition dated April 7, 1950, and their supplemental petition dated April 10, 1950 (Tr. pp. 163-165, 166).

At 11:30 A. M. on April 8, 1950, the Mississippi Democratic Committee of the Mississippi Democratic Party (affiliated with the National Democratic Party) applied for registration of their party name (Tr. pp. 167-169). On April 10, 1950, the Secretary of State sought the advice of the Attorney General as to the right of registration of that group (Tr. pp. 170-171). The "Trumancrats" then filed an amendment to their petition for registration on April 20, 1950, at 11:20 A. M. (Tr. pp. 172-185), and on the next succeeding day the Attorney General advised the Secretary of State that the "Mississippi Democratic Party (affiliated with the National Democratic Party)" was not entitled to registration because of its failure to comply with Section 3107, Mississippi Code of 1942, as amended (Chapter 308, Laws of 1948), and because of the prior registration of the

word "Democratic" to a prior group (Tr. pp. 186-191). On April 28, 1950, the Secretary of State advised the Secretary of the "Trumancrats" that they were not entitled to registration (Tr. p. 192).

On April 29, 1950, at 11:30 A. M., the political party represented by the petitioners, which was known as the "Republican Party of Mississippi", applied for registration and showed a compliance with Section 3107, Mississippi Code of 1942, as amended (Tr. pp. 193-198). On May 2, 1950, the Attorney General of the State of Mississippi advised the Secretary of State as follows:

> "I think the petition filed herewith shows that the Party Conventions of the applicant were held in accordance of these laws, but for the fact that a prior registration of another party making similar showing had already been registered, petitioners would be entitled to registration; but under House Bill 912, two political parties cannot be registered under the same name, each claiming to be a political party whose name was registered or sought to be registered.
>
> • • • • • • •
>
> "You are, therefore, advised that you have no authority under House Bill 912 of the Laws of 1950 to register the petitioners in this case, and if the petitioners desire to contest the question they will be required, in my opinion, to proceed in the Circuit Court in appropriate proceedings." (Tr. p. 202).

Petitioners filed a petition with the Secretary of State to re-open the question of registration of the name "Republican Party of Mississippi" for the purpose of taking proof on the various contentions made by the petitioners and respondents in their efforts to use the name "Republican", said petition for rehearing being filed on May 5, 1950 (Tr. pp. 203-204). On May 13, 1950, the Secretary of State ad-

vised the attorneys who were then representing the petitioners that he was without authority and therefore unable to register a party known as "The Republican Party of Mississippi" (Tr. p. 214).

The petitioners, having been denied any relief by the Secretary of State, filed a suit in the Circuit Court of the First Judicial District of Hinds County, Mississippi, seeking a writ of mandamus to compel the Secretary of State to cancel the registration of the respondents as the "Republican Party of Mississippi" and directing the Secretary to register the petitioners and their organization as the regular Republican Party of Mississippi (Tr. p. 61). The declaration was set forth in two counts, the first asserting that:

> "The plaintiffs allege that the adoption of the resolution whereby the defendants undertook to change the name of the Independent Republican Party to Mississippi Republican Party, Paragraph 10, page 8, of this declaration, is void in that there is no lawful authority whereby one party may be converted into another, and for the further reason that the organization of a party could not then be effectuated in any other way than by holding precinct elections and county and state conventions, as provided by Chapter 308 of the Laws of Mississippi of 1948 . . ."

On April 3, 1951, the plaintiffs in that cause, petitioners here, amended their pleadings so as to pray for a writ of certiorari, commanding the Secretary of State to bring up the records of his office and for an adjudication by the Circuit Court that because of error apparent on the face of the record (that the respondents had changed the name of their party by resolution) the party of the respondents was not entitled to registration (Tr. p. 83). The writ was issued as prayed (Tr. p. 138).

The defendants in that cause, respondents here, having denied that the resolution by which the name of their party

had been changed was void, two issues were tried before the Circuit Court: First, whether the respondents were entitled to registration as a result of the resolution, and, second, whether the petitioners had complied with the registration laws of Mississippi so as to be entitled to registration if the defendants were not so entitled.

The prayer for relief in the second count of the petitioners' declaration in the prior action was as follows:

> "Wherefore, the plaintiffs say that if they are not entitled to the relief prayed for in the first count of this declaration, said act of the Legislature is void and of no effect and the plaintiffs pray that the court will enter an order so declaring said act to be unconstitutional" (Tr. p. 63).

The constitutionality of the act was never passed on by the Circuit Court of Hinds County. Beginning on page 252 of the transcript, and concluding on page 261 thereof, the Court, in deciding whether the defendant party could be properly registered, having changed their name by resolution, discussed the constitutionality of the act, but only by way of reaching a decision as to whether the defendant party could be properly registered.

From page 263 of the transcript to page 282, proof was had on whether the party of the plaintiffs in that action, petitioners here, was properly qualified for registration. Thus at no point in the record did the Circuit Court of Hinds County directly consider the constitutionality of the act.

The judgment of the court is found on pages 383-385 of the transcript, the pertinent parts thereof reading as follows:

> "1. That the defendants, J. E. Hoskins, J. A. White and George L. Sheldon, did not organize as the Republican Party of Mississippi, by holding precinct, county

and state conventions, during the time prescribed by Chapter 308, Laws of 1948, and under that name, but organized as the Independent Republican Party of Mississippi and that they were, therefore, not entitled to register as the Republican Party of Mississippi.

"2. That the plaintiffs, Perry W. Howard, Mary Montgomery Booze, S. W. Miller and C. T. Butler, represent the Republican Party of Mississippi, that said party was organized by a substantial compliance with the provisions of Chapter 308 of the Laws of 1948, adopted at the regular session of the legislature of the State of Mississippi and that the plaintiffs are, therefore, entitled to registration of the party represented by them, as the Republican Party of Mississippi . . ."

At no place in the judgment rendered by the Circuit Court of Hinds County and at no place in its finding of fact and conclusions of law is the word "constitution" mentioned in any manner whatsoever. The constitutional question was pleaded in the alternative by the plaintiffs in that action, was not considered by the Circuit Court, and no decision rendered thereon by that court.

The respondents appealed from the decision of the Circuit Court and the Supreme Court of Mississippi in *Hoskins* v. *Howard*, 214 Miss. 481, 59 So. (2d) 263, entered its judgment on May 26, 1952, reversing the court below and reinstating the registration of the party represented by the respondents and cancelled the registration of the party represented by the petitioners.

The petitioners filed their suggestion of error in the Supreme Court of Mississippi, which was overruled on July 17, 1952, and the petitioners, having exhausted all procedure for obtaining their rights in the State Court, prepared their case for appeal by certiorari to the United States Supreme Court, but through the illness of their attorney, the petition was filed too late and denied on that ground on January 5, 1953.

Point I

Chapter 458, General Laws of Mississippi, 1950, as Construed and Applied by the Supreme Court of Mississippi, Violates the Rights Guaranteed to Petitioners by the Fourteenth Amendment to the Constitution of the United States.

It is interesting to note that section 10 of Chapter 458, instead of attempting to eliminate political parties, *expresses the purpose of preserving all rights of all then existing political parties;* Section 10 of the Act provides as follows:

> "*The purpose of this Act is to provide additional remedies for the protection of the political parties of this state* and this act is not to be construed as amending or repealing any law presently existing except as is provided in Section 7 hereof . . ." (Emphasis added)

As stated above, the States Righters were in complete control of the legislature and of the principal executive offices of this state, and none of these officials were concerned about the relation of either Republican group, nor were they concerned about limiting the number of political parties. The sole purpose of Chapter 458 was to strike down the growing strength of that group of "Democrats" which were affiliated with and aided by the National Democratic Party, at a time when the "States Righters" had cast off, or had been cast off, by the National Democratic Party. It is obvious that the legislature did not intend to take away any rights of lawfully existing parties. Indeed the legislature must have enacted this law with knowledge of the constitutional ban against retrospective legislation having the obvious effect of striking down the rights of these petitioners to the non-exclusive use of the name "Republican",

which they had acquired and used over a period of many years. The express language of the Act, as shown by Section 10, would presuppose that all of the then existing and properly organized political parties were to be registered under the law. It is the interpretation and construction of this law by the Supreme Court of the State of Mississippi which has rendered the law unconstitutional, in that the acquired rights of the petitioners and those whom they represent have been denied them without due process of law and they have been denied the equal protection of the laws. It is perfectly apparent that the sole criterion established by Chapter 458, as to the right to use any particular name is that the first who comes shall be granted the right, and one who arrives simultaneously or five minutes later, shall be denied the right, and indeed, shall be subject to an injunction as well as charged with unlawful acts. Although all other statutory requirements had been met by the petitioners party, Chapter 458 (Section 6 and Section 3107-06, Mississippi Code of 1942, as amended) not only denies to the petitioners party the use of the name "Republican" but likewise makes any activities on their behalf unlawful.

A. *Political Rights, Including the Right to Organize and Perfect the Machinery of a Political Party, Are the Foundation of Democratic Government and Are Protected by the Constitution of the United States.*

The election of state and local officials, as well as the election of representatives and senators for the United States Congress are locally regulated by Sections 3105-3148, Mississippi Code of 1942, as amended. Section 3105 provides the mode of nominating state, district, county and county district officers by *primary elections.* Section 3109 provides the date of primaries; Section 3111 provides primaries for representatives in the National Congress, as well as for senators. Section 3118 provides for the names of

candidates to be submitted to the executive committee of the various political parties. Section 3119 provides for the expenses to be paid for printing ballots for the primaries said expense to be borne by the state. Section 3124 provides for the printing of the various ballots. Section 3148 provides for the election of chancellors and circuit judges at the same primary at which representatives and senators are nominated for the National Congress. It is thus apparent that the interweaving of party nomination for representatives and senators to the National Congress composes a vital part of the primary system in the State of Mississippi.

Section 2 of Article I of the Constitution of the United States secures to those qualified to vote the right to select representatives to the National Congress. It has been determined by the Supreme Court of the United States in *United States* v. *Classic*, 313 U. S. 298, 85 L. Ed. 1368, where the Court took judicial notice of the fact that in America we have "party government", and that party organization and suffrage were bound together, the Court saying:

> "We are now concerned with the question whether the right to choose at a primary election, a candidate for election as representative, is embraced in the right to choose representatives secured by Article I, Section 2. We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs

> of men, those fundamental purposes which the instrument itself disclosed. Hence, we read its words, not as we read legislative codes which are subject to continuous revisions with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government."

The right to vote and choose includes the right to make the choice effective. *Terry* v. *Adams,* 345 U. S. 461, 73 S. Ct. 809, 97 L. Ed. 1152; *United States* v. *Classic, supra.*

The Seventeenth Amendment to the Constitution of the United States provides for the election of senators to the National Congress. In *Newberry* v. *United States,* 256 U. S. 263, 65 L. E. 923, 41 S. Ct. 469, the Court emphasized the importance of party primaries, saying:

> ". . . the result of the primary has been in substance to render the subsequent election merely perfunctory."

That the right to organize a political party and maintain in its name all the machinery reasonably necessary to make it effective is inseparably bound up with the right of an elector to choose his own representative can, as a practical matter, scarcely be questioned. *State* v. *Houser,* 112 Wisc. 534, 594, 100 N. W. 964, and to say that the Constitution protects the citizen only in the mechanical right to mark and cast his ballot, is to place a formality and a rigidity upon that document it was never intended to receive. *Gompers* v. *United States,* 233 U. S. 604, 610, 58 L. Ed. 115, 1120, 34 S. Ct. 693, Ann. Cas. 1915D, 1044 (1914).

In 29 *C. J. S.* 108, Section 84, it is said:

> "The people have the inherent right to form or organize and to operate political parties. This right has been held to be included in the right of sufferage, and to include, in addition, the right to organize, the right to

have all the machinery not reasonably prohibited by law for making the organization effective . . ."

The petitioners do not challenge the right or power of the State of Mississippi to regulate political parties within its borders. They do not challenge its right to police its ballots. The question raised by the petitioners is not whether the State of Mississippi has such power, but whether the means which it employed in enacting Chapter 458, Laws of 1950, conflict with the First Amendment to the Constitution and the due process and equal protection of the law clauses of the Fourteenth Amendment. In other words, petitioners concede that the state legislature may pass such laws as will *aid* the citizens in the enjoyment of his constitutionally guaranteed rights. As was said in *State* v. *Houser, supra:*

> "The power of regulation to that end is limited only by what is reasonable. Any attempt to regulate passing that barrier is destructive of the right involved, not an aid to its enjoyment, and hence is not legitimate."

In *United States* v. *Classic,* 313 U. S. 298, 85 L. Ed. 1368, the Court held:

> ". . . Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, Section 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never, determines the ultimate choice of the representative, . . ."

In *Herndon* v. *Lowry,* 57 S. Ct. 732, 301 U. S. 42, 81 L. Ed. 1066, the appellant was convicted of violating Georgia's

statute against "subversive utterances" and "subversive activities", and he contended that the statute was unconstitutional in that it deprived him of freedom of speech and freedom of assembly as protected by the Fourteenth Amendment. The evidence showed that the petitioner was an organizer for the Communist Party. The Court held:

> *"The appellant had a constitutional right to address meetings and organize parties unless in so doing he violated some prohibition of a valid statute.*
>
> • • • • • • •
>
> ". . . So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty imposed in the Fourteenth Amendment." (Emphasis added.)

It is submitted, with the utmost deference, that these petitioners have a non-exclusive right protected by the Fourteenth Amendment to the Constitution of the United States to the use of the name "Republican" and to exist as a political party (as they have done for many years), and that Chapter 458, Laws of 1950 has violently infringed upon these rights, and has actually (if the law is constitutional), caused the death of a political party existing for many years. If a state may pursue this course, then it may likewise pass a law saying that the first political party to register shall be the only one permitted to register and thereby effectively destroy the two party system in that state. Similarly, if a state may go that far, and if the rights of political parties are not protected by the Fourteenth Amendment, then a state may likewise legislate that there shall be no political parties and thereby provide for rule in an unconstitutional and undemocratic way. It is respectfully submitted that these petitioners have rights which are protected by the Fourteenth Amendment and that these

rights have been infringed upon by Chapter 458, Laws of 1950, and that said law is therefore unconstitutional.

B. *The "Foot Race" Law (Chapter 458, Laws of 1950) Violates the Rights of These Petitioners as Protected by the Fourteenth Amendment*

It is argued by the respondents that the right existing in the State of Mississippi to supervise and regulate the activities of political parties carries with it the right to designate a "first come—first served" registration, and that the state further has the right to declare that any parties not so permitted to register shall be unlawful and their activities enjoined. In advocating this particular theory, the respondents have overlooked the restrictions upon state control over political parties as announced by *Herndon* v. *Lowry, supra,* where the Court stated:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension to danger of organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principles of the constitution."

The power to regulate and to control carries with it the requirement that such regulation and control fall within the provisions of the Fourteenth Amendment. The right to organize and effectuate the purposes of political parties is so inherent a part of the democratic government of this nation as to fall within the protection of the Fourteenth Amendment. The petitioners do not question the right of the State of Mississippi to impose reasonable regulations upon the existence of political parties and to so su-

pervise their activities as to guarantee to the qualified electors of this state the right to effectively select the governing officials of their choice. The right of regulation, supervision and control carries with it the obligation to do so in a justifiable fashion and with a valid objective in mind. Where there is regulation there must be a companion reason therefor. Where there is elimination there must be a valid public purpose to be gained. The State of Mississippi cannot, with justification, strike down the efforts of these petitioners and those in whose behalf they sue, to sponsor and vote for the candidates of their choice. They have met the requirements of Section 3107; they have been in existence for many years, and have functioned as a valid and recognized political party. Their rights are taken from them solely because they did not file with the Secretary of State prior to 1:55 P.M. on April 7, 1950. In an attempt to draft a law which would be constitutional, the legislature stated that its purpose was to protect the rights of all existing political parties, yet the interpretation and construction of the law by the Secretary of State, by the Attorney General, and by the Supreme Court, deny to the petitioners the right to register, although they applied within the thirty days provided, and although they admittedly had complied with the reasonable requirements of Section 3107. (Tr. p. 202). Upon what principle can a conclusion of valid public purpose, valid police power, or valid control and supervision be concluded in such construction and interpretation? As stated above, if the State of Mississippi is authorized under the Constitution to pass such a law, then it, or any other state, may pass a law saying that the *first* political party to register shall be the only political party, and indeed, it would probably have the right under such a construction to say that there shall be *no political parties.* If such construction would then be

legal, constitutional government shall have passed from the scene in this state and nation.

Our Courts, however, have not denied political parties a place in our constitutional government. In *Albertson* v. *Millard*, 106 F. Supp. 635 (D. C. E. D. Mich.), where a Communist Party was by law denied the right to a place on the ballot, the Court found that the party was dedicated to illegal purposes and upheld the act, but said:

> "The precise question with which we are concerned,, as was the Supreme Court in Denis vs. United States, supra, and American Communications Association vs. Douds, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925, is not, whether the state has such power, but whether the means which it employed conflict with the First and Fifth Amendments to the Constitution and the due process clause of the Fourteenth Amendment. It may be at once conceded, without the necessity of citing authority, *that the state has no power, ordinarily, to arbitrarily refuse any political party which has complied with all reasonable election laws of the state, a place on the ballot either in state or federal elections.*" (Emphasis added)

The Courts have held that before a party can be denied the right to participate in elections, a valid reason for classification must be made. In *Feinglass* v. *Reinecke*, 48 F. Supp. 438 (D. C. N. D.), the legislature passed an act which allowed nominees of the Communist Party to be deprived of a place on the ballot, without stating any valid reason for denying this class such a right. The Court in striking down the statute held:

> "If the term Communist is to be taken to mean simply a belief in a system in which goods and the instruments of production are held in common by the people, then the statute is clearly unconstitutional. . . . If a party advocating common ownership of goods and instru-

> ments of production may be barred from the ballot so may a party advocating free trade . . ."

If the construction contended for by the respondents in this case is a valid construction, a state whose governing officials are members of the Democratic Party may outlaw other parties and the Republican Party may be stricken down and held to be illegal. Conversely, if the governing officials are members of the Republican Party, then the Democratic Party may be stricken down. This result is only one step removed from the result contended for by the respondents in this case. The only possible justification for the construction contended for is on the basis that the respondents first registered and that the petitioners are, therefore, denied the right to do so. It is a first come—first served, proposition without any reasonable justification therefor and without any valid public purpose to support it.

In *Southern Railway* v. *Greene,* 216 U. S. 40, 30 S. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247, the Court established the rule concerning classification which has prevailed until this day.

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis."

In *Cotting* v. *Kansas City Stock Yards, et al.,* 183 U. S. 79, 46 L. Ed. 92, 22 S. Ct. 30, a statute of Kansas defining what shall constitute public stock yards and regulating all changes thereof, was held to be in conflict with the Fourteenth Amendment for the reason that the definition of a "stock yard" was made to depend upon the volume of business done, and the facts showed that the Kansas City Stock

Yard company was the only one within the definition, and the legislation was, therefore, a denial of the requirements of the equal protection of the laws.

In *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 431, the Court in considering an anti-trust statute of Illinois which exempted from its operations certain producers of agricultural products and raisers of livestock, said:

> "The difficulty is not met by saying that generally speaking a state, when enacting laws, may, in its discretion, make a classification of firms, corporations, and associations in order to subserve public purpose. For this Court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrary and without any such basis . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this . . . *No duty rests more imperative upon the courts than the enforcement of those constitutional provisions intended to secure the equality of rights which is the security of free government.*" (Emphasis added)

The Supreme Court of Mississippi has construed this statute as providing a justifiable public purpose in the control of political parties. The only justification given is that the first come—first served basis of classification is a valid regulation. Yet the statute itself expresses the purpose of protecting all existing political parties which are validly and properly organized. The classification and the interpretation thereof must, of necessity, (if it be constitutional) cause the death of one of the two groups using the name Republican. The selection of the one which shall thus perish is determined by the moment of arrival in the office of the Secretary of State. Had the petitioners filed an application

for registration ten minutes in advance of that filed by the respondents, the petitioners would apparently have received the right to registration. There would have then followed the death of the group represented by respondents.

The petitioners have not contended, and do not contend, that they are the sole owner of the word "Republican", nor that they are the only group of Republican adherents who are permitted to exist under state and federal law. They do contend, however, that they have an equal right to exist and to exercise their ballot in a lawful way. They have done so for many years, and the Constitution of the United States guarantees them the right to do so in the future. Valid legislation must be predicated upon these principles. The law announces no valid reason for the existence of these parties on a first come—first served basis. To do so is a most apparent violation of the Fourteenth Amendment.

The Courts in defining "due process" have expanded it beyond its literal meaning of "due procedure". Thus, Mr. Justice Brandeis, concurring in *Whitney* v. *California*, 274 U. S. 375, 47 S. Ct. 641, 71 L. Ed. 1095, said:

> "Despite arguments to the contrary which had seemed to me persuasive, it is settled that due process clause of the Fourteenth Amendment applies to matters of substantive law as well as matters of procedure. Thus, all fundamental rights comprised within the term 'liberty' are protected by the federal constitution from invasion by the states. The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights . . . These may not be denied or abridged . . ."

When applied to substantive rights, it is now interpreted to mean that the government is without the right to deprive a person of life, liberty or property by an Act that has no reasonable relation to any proper governmental purpose, or which goes beyond the necessity of the case so as to

be an arbitrary exercise of power. *Davidson* v. *New Orleans, Louisiana*, 96 U. S. 107, 24 L. Ed. 616.

What could be more unfair, unjust, and unreasonable than a law which apparently gives parties thirty days within which to register and protect their rights, but which, in reality, is nothing more than a "foot race" law, operating on a purely "first come—first served" basis, which has no reasonable relation to the object sought to be gained.

Nothing contained in Chapter 458, Laws of 1950, indicates that it was passed to protect public welfare, nor was it designed to protect any class who, because of special circumstances, stood in special need of the exercise of the state police power. *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 159 A. L. R. 1469; *West Hotel Company* v. *Parish*, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703. The purpose was to protect legally organized political parties. This it did not do. It provided that lawfully existing parties should register, but by establishing no stated time within which registration could be had, made it a "foot race" as between the party represented by the petitioners and the party represented by the respondents. It is submitted that the protection of substantive rights cannot be made to rest upon so arbitrary a basis. In *Lane* v. *Wilson*, 307 U. S. 268, 83 L. Ed. 1281, Oklahoma's "grandfather clause" had been stricken down as unconstitutional. *Guinn* v. *U. S.*, 238 U. S. 347, 59 L. Ed. 1340, 35 S. Ct. 926, L. R. A. 1916A. 1124. The state legislature then passed an Act which gave citizens who had been deprived of their right to vote under the "grandfather clause" twelve days in which to register. In striking down the new Act, the Court held:

> "The practical effect of the 1916 legislation was to accord to the members of the negro race who had been discriminated against in the outlawed registration system of 1914, not more than twelve days within which to

> reassert constitutional rights which this court found in the Guinn case to have been improperly taken from them. We believe that the opportunity thus given negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and confined . . ."

In that case, at least the plaintiff had twelve days in which to assert his rights, while in this case the petitioners had no definite time at all. There was no requirement in Chapter 458, Laws of 1950, that petitioners be not late, the requirement, as the Act has been interpreted and construed, was that the petitioners be not last.

In *Ochoa* v. *Hermandez Y Morales*, 230 U. S. 139, 33 S. Ct. 1033, 57 L. Ed. 1427, where the statute of limitations was shortened from twenty years to six years, the Court said:

> "With reference to statutes of limitation, it is well settled that they may be modified by shortening the time prescribed, but only if this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect . . ."

It is a well settled principle of constitutional law that when the legislature acts so as to deprive citizens of existing rights, the law "shall not be unreasonable, arbitrary or capricious" and that the means selected shall have a real and substantial relation to the object sought to be obtained. "It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." *Nebbis* v. *New York*, supra.

Chapter 458, Laws of 1950, as construed, fails in every way to measure up to constitutional standards: it makes an unreasonable classification; has no relation to the object

sought to be obtained; arbitrarily condemned without hearing; rendered judgment without trial. The respondents party, trapped by this unreasonable law, reached the office of the Secretary of State last and was condemned to die, not as a result of a trial after due process of law but solely because of their name.

To say that the petitioners may reorganize their party under a new name is no answer. It would not then be the same party. As has been so aptly pointed out in *State* v. *Houser*, supra, the party name under which a candidate seeks election is more important than his personal attributes. Nor is it any answer to say that so long as the petitioners and the members of the party they represent may continue to mechanically mark and cast their ballot, they have been deprived of nothing. Even in totalitarian states the citizens have the right to vote. But we Americans know that they have no political freedom because their vote cannot be made effective. That is the right these petitioners seek to protect—the right to make their vote effective by continuing their party name.

Point II.

The Lower Court Had (and This Court Has) Jurisdiction of the Persons and of the Subject Matter, and Substantial Federal Questions Were and Are Presented Which Arise under the Constitution of the United States.

The Petitioners brought this action alleging that Chapter 458, Mississippi Laws of 1948, is repugnant to the Constitution of the United States and is unconstitutional in that it denies the Petitioners rights, privileges and immunities guaranteed to them by the Constitution of the United States and its Laws, and that it takes from them property without due process of law. The action was brought on behalf of Petitioners, individually, and as officers of the Republican

Party, as members thereof, and as citizens of the State of Mississippi, and also on behalf of all the members of the Republican Party of Mississippi who are similarly situated.

Jurisdiction of the District Court was invoked under Title 28, U. S. Code, Section 1331, wherein the District Court is given original jurisdiction of all Civil Actions, "wherein the matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interest and costs, and arises under the Constitution, laws, or Treaties of the United States."

The Petitioners in paragraph six of their Bill, made the following allegation:

> "The amount in controversy, involving a property right to a political name and title, *and the right to exist as such under the said name,* exceeds in value the sum of three thousand ($3,000.00) dollars, exclusive of interest. . . ." (Emphasis added)

The jurisdictional amount pleaded above was denied by the respondent, George L. Sheldon, and the third defense raised in his Answer was as follows:

> "No allegation of fact contained in the Complaint herein supports the conclusion alleged that the amount in controversy as *to any individual party to this action exceeds three thousand dollars, exclusive of interest and cost, and defendant denies that there is involved the sum of three thousand dollars as to each plaintiff. . . .*" (Emphasis added)

The Courts have repeatedly held that a suit will not be dismissed on Motion or on Demurrer on the ground that the requisite jurisdictional amount is not involved if the Bill alleges that the matter in dispute exceeds in value such amount, and discloses no facts which contradict such allegations. *North American Cold Storage Company* v. *Chicago,* 151 Fed. 120 (C. C. Ill.); *Green* v. *Valley,* 101 Fed. 882 (C. C.

Ia.). As stated in *KVOS* v. *Associated Press*, 57 S. Ct. 197, 299 U. S. 269, 81 L. Ed. 183:

> " . . . The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the Petitioner. No facts are pleaded which tend to show the value of that right. The Complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars ($3,000.00), and the amount involved is in excess of that sum. Such a formal allegation is sufficient, unless the bill contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that the jurisdiction appears on the face of the complaint. . . ."

As pointed out, the respondents have denied the jurisdictional amount to be involved as to each respondent, but stated not one single fact to substantiate the denial made. It was not claimed that the right to a party name and the right to exist under a party name were not property rights, and no reasons were set forth as to why the value of such rights does not exceed the value of exclusive of cost. Under such circumstances, the only problem raised for the Petitioners was to prove the requisite jurisdictional amount. *Gibbs* v. *Buck*, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 111. In other words, until the record actually revealed that the suit did not really and substantially involve the jurisdictional amount, the formal allegations contained in the Complaint were sufficient to sustain the Court's jurisdiction. *Maffett* v. *Quine*, 95 Fed. 199. The Supreme Court in *Hilton* v. *Dickinson*, 108 U. S. 165, 2 S. Ct. 424, 27 L. Ed. 668, stated the rule in the following manner:

> "It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not

the matter in dispute that sum will govern in all questions of jurisdiction . . ."

A

In a Class Action the Interest of All Members of the Class May Be Aggregated for the Purpose of Jurisdictional Amount

It should be pointed out to this Court, and would be made to appear upon a hearing on the merits, that the respondents did not deny the requisite amount was involved. The denial made was that the requisite amount was not involved as to each "Plaintiff".

The Petitioners, however, did not bring this action to protect only their individual rights. This is not a case of aggregating several individual claims for convenience. Petitioners do not seek individual judgment, but rather a judgment to protect the rights of a "class", as well as the individual Petitioners in the use and enjoyment of the name of their party. The rights Petitioners seek to protect is one they have in common with all other members of their party similarly situated, whose numbers run into the thousands. In such a situation, and in this class of action, it is unnecessary to show the jurisdictional amount in each Plaintiff, but only that the jurisdictional amount is involved.

In *Davidson 525, Order of Railway Conductors of America* v. *Gorman,* 133 Fed. (2d) 273, the rule in class actions was laid down as follows:

> ". . . All of the Plaintiffs claimed an undivided common interest in the rights which they seek to enforce. They did not ask separate judgments and it appears without dispute that the value or amount of the aggregate amounts of all these Plaintiffs exceeds $3,000.-00. Their claim is bottomed on the pleaded contract

and was asserted as an entity. We think the jurisdictional amount is involved. . . ."

In *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U. S. 39, 56 L. Ed. 813, the Court said:

> "When two or more Plaintiffs having a separate and distinct demand, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common or undivided interest, it is enough if their interest collectively equal the jurisdictional amount . . ."

Again in *Gibbs* v. *Buck*, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 111, this Court said:

> "Federal jurisdiction will be adequately established, if it appears that for any member who is a party, the matter in controversy is of the value of the jurisdictional amount, or, *if to the aggregate of all the members in this representative suit, the matter in controversy is of that value.*" (Emphasis added)

The respondents, as pointed out, have not denied the jurisdictional amount to be involved except as to each individual petitioner. As this is a class action and the jurisdictional amount does not have to appear in each petitioner, the denial of respondents was, and is, in effect, no denial at all. Any real challenge as to jurisdictional amount must, therefore, be of the Court's own motion.

B

The Right to Vote, Organize Political Parties, and Continue to Act Under the Party Name Is a Property Right Entitled to Protection As Other Property

It is the contention of the Petitioners that they, and the party and class they represent, have a property right in

the name "Republican" of which they have been divested without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

There can be no question but that the franchise is a valuable property right. *Ashby* v. *White*, House of Lords, 1703, *1 Bro.* P. C. 47, 8 St. 89. In *Black's* Law Dictionary, the franchise is defined as "a legal right until it is recalled, and *it is protected by the law as property is*". (Emphasis added)

In 29 C.J.S., pg. 108, Section 84, we find the following:

> "The people have the inherent right to form or organize political parties. This right has been held to be included in the right of suffrage."

And includes "the right to organize the right to have all the machinery not reasonably prohibited by law for making the organization effective as regards the declaration of policies and election of officers in harmony therewith." See also *State ex rel, Kern* v. *Damnann*, 245 N. W. 759, 216 Wisc. 394.

By being last, as opposed to late, in applying for registration of their party with the Secretary of State, the Petitioners and the thousands on whose behalf this suit was brought were deprived of their party name. As stated in the authorities above, they were then deprived of the thing they had the inherent right to enjoy. Without their party name they, as a party, and as individuals, are rendered at once impotent in their attempts to give effective expression to their political policies and convictions.

In *State* v. *Houser*, 112 Wisc. 534, 594, 100 N.W. 964, the question of which of two rival Republican Parties would appear on the ballot was before the Court. The Court there discussed the value of a party name at length, saying:

> "That the question of which of two rival state tickets shall appear on the official ballot as the regular ticket

of a great political party is a question publici juris, I cannot doubt. That the decision of this question materially effects the liberty of the people and involves the general interest of the State at large, I can have little doubt. It is easy to say that so long as the names appear at some place on the ballot, that the voter may designate them, if he chooses, every reasonable requirement is satisfied . . . We live in the days of party government. Whether it be desirable or not we cannot escape it if we would. All the recent laws providing for official ballot and recognizing conventions and caucuses as quasi governmental agencies have, in my judgment, made the party organization and the party name more powerful than ever. . . . We all know that if the name of John Doe goes on the official ballot in the column headed by the name of the dominant party he will, in all reasonable probability, be elected, while if it is put in another column it is equally probable that he will be defeated; not because of any difference in his intellectual, mental, or moral qualities, but simply because of the weight and influence of the party name and its influence on the voters. . . .

"In view of these well understood conditions, the right to use of the party name cannot be reasonably called a trivial right, nor the question who is entitled to its use an unimportant question."

If the right to vote carries with it the right to vote for Congressman and Representatives, *United States* v. *Classic*, 313 U. S. 298, 85 L. Ed. 1368; *Newberry* v. *U. S.*, 256 U. S. 263, 65 L. Ed. 923, 41 S. Ct. 469, it carries with it the right to vote under a party name. *Progressive Party* v. *Flynn*, 400 Ill. 102, 79 N.E. (2d) 516. The right to vote under a party name carries with it the right to have that name free of unreasonable and arbitrary laws. *Southern Railway* v. *Greene*, 216 U. S. 400, 30 S. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247; *State* v. *Houser*, supra; *Albertson* v. *Millard*, 106 F. Supp. 634, (D. C. ED, Mich.); *Feinglass*

v. *Reinecke*, 48 F. Supp. 438 (D. C. N. D.); *Lane* v. *Wilson*, 300 U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281.

The Petitioners have alleged that they have property rights in the name "Republican" and that they have been deprived of these rights in a manner which violates the due process clause of the Fourteenth Amendment. That they might be wrong does not affect jurisdiction. They have been deprived of a right enjoyed for many years. It effects their very fundamental liberties and years of labor spent in an effort to make their votes effective to express their political philosophies. They have based their actions squarely on constitutional grounds; that is the sole basis of their suit.

As was said in *Bell* v. *Hood*, 66 S. Ct. 773, 327 U. S. 678, 90 L. Ed. 939:

> ". . . Respondents maintain that Petitioners could not recover under the Constitution or Laws of the United States, since the Constitution does not expressly provide for recovery for money damages or violations of the Fourth and Fifth Amendments and Congress has enacted a statute that does so provide. . . .
>
> "Whether or not the complaint as drafted states a common-law action in trespass, made actionable by state law, it is clear from the way that it was drawn that Petitioners seek recovery squarely on the grounds that the respondent violated the Fourth and Fifth Amendments . . .
>
> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action upon which Petitioners could actually recover. . . . The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or Federal Statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such

a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. The Fair v. Kohler Die & Specialty Co., supra . . ."

Again in *Cuyahoga Power Co.* v. *Akron*, 240 U.S. 462, 60 L. Ed. 743, 26 S. Ct. 407, this Court said:

". . . Whether the plaintiff has any rights that the City is bound to respect can be decided only by taking jurisdiction of the case. . . ."

And in *Mosher* v. *Phoenix*, 287 U.S. 29, 53 S. Ct. 67, 77 L. Ed. 148, Petitioner brought suit alleging that the City was appropriating her property without compensation and without due process of law. The District Court dismissed for want of jurisdiction and the Circuit Court of Appeals affirmed. This Court in reserving the said case held:

"We are of the opinion that the allegations of the Bill of Complaint that the City, acting under color of State authority, was violating the asserted private right secured by the federal constitution and presented a substantial federal question and that it was error for the district court to refuse jurisdiction."

C

The Respondents Have Shown the Requisite Jurisdictional Amount to Be Involved

It has long been settled that the rights involved and the right to vote are capable of a monetary valuation. Thus, in *Wiley* v. *Sinkler*, 179 U.S. 58, 45 L. Ed. 84, 21 S. Ct. 17, an action was brought by the plaintiff against the Board of Managers of a general election in which he alleged that he was a qualified elector; had been denied the right to vote, and sought damages for $2,500.00. A demurrer was inter-

posed, the first ground being that the court had no jurisdiction. Of this this court on appeal said:

> "The damages are laid at the sum of $2,500. What amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of a jury and no opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the circuit court. . . ."

It is true that the Petitioners have not asked for damages, but they do seek protection from the unlawful invasion of their rights which greatly exceeds in value the jurisdictional amount. In a suit for an injunction it is the value of the rights sought to be protected that determines the court's jurisdiction.

In *Grandin Farmer's Coop. Elevator Company* v. *Langer*, 5 F. Supp. 425, affirmed 292 U.S. 605, 78 L. Ed. 1467, 54 S. Ct. 772, the Governor of North Dakota placed an embargo on the shipment of grain out of the State, pursuant to a statute. The plaintiffs brought their action alleging the act to be unconstitutional and the question of jurisdictional amount was raised by the defendants. The court denied the validity of the defendants' plea and issued the injunction, saying:

> "The defendants contend that it does not appear that a sufficient amount is involved to give this court jurisdiction, and assert that the complainants have an adequate remedy at law, and, moreover, that the legislative act and the executive proclamations constitute no more than a lawful exercise of the police power of the state in view of the existing economic conditions.
>
> "The bill asserts the action involves more than $3,000.00 exclusive of interest and cost. It is obvious that what the complainants seek to protect is the right to operate their elevators and to conduct their business

free of the restrictions complained of. *The value of that right is the amount in controversy.* (Emphasis added)

"Complainants set up a right to maintain and operate its plant and conduct its business free from wrongful interference by Defendant. This right is alleged to be of a value in excess of the jurisdictional amount, and at the hearing no question seems to have been made but that it had such value. The relief sought is the protection of that right, now and in the future, and the value of that protection is determinative of the jurisdiction". Glenwood Light & Water Co., v. Mutual Light & Power Co., 239 U.S. 121, 126, 36 S. Ct. 30, 32, 60 L. Ed. 174. . . .

"To justify a dismissal where the jurisdictional amount is in question, absence of jurisdiction must be shown to a legal certainty. . . ."

It must be kept in mind that this is a class action; that the rights of thousands of members of petitioner's party are involved, and that respondents have not denied the jurisdictional amount to be involved except as to each petitioner, individually. There is nothing in the record to show that the aggregate rights of the class does not exceed the jurisdictional amounts as alleged. These rights are capable of monetary valuation, *Wiley* v. *Sinkler, supra,* and are rights which should be protected by injunction.

In *Giles* v. *Holmes,* 189 U.S. 475, 47 L. Ed. 909, 23 S. Ct. 639, the plaintiff appealed from the Circuit Court of the United States for the Middle District of Alabama to review a decree, which dismissed for want of jurisdiction, a bill in equity to compel the Board of Registrars to enroll a negro on the voting lists. The Alabama Constitution provided qualifications for those registered prior to 1903, and a different set of qualifications involving more severe tests for those registering after 1903. The principal object of the plaintiff's bill was to obtain the permanent advantages of

registration as of a date of 1903. Of the question of jurisdictional amount this Court said:

> ". . . But it is suggested that the Circuit Court was right in its ruling that it had no jurisdiction as a court of the United States, because the bill did not aver threatened damage to an amount exceeding $2,000. . . . We have recognized too, that the deprivation of a man's political and social right properly may be alleged to involve damage to that amount, capable of estimation in money. Wiley v. Sinkler, 179 U.S. 58, 45 L. Ed. 84, 21 S. Ct. 17; Swafford v. Templeton, 185 U.S. 487, 46 L. Ed. 1005, 22 S. Ct. 783. . . ."

In *State, ex rel. McGrael* v. *Phelps*, 144 Wisc. 1, 128 N. W. 1041, the court said:

> ". . . The right of suffrage includes the right of voters to separate into groups according to their political beliefs respecting governmental policies, and the right of every group to organize and have all the machinery in that regard not reasonably prohibited by law for making the organization effective as regards the declaring of its members, and vitalizing its policies by electing officers in harmony therewith to legislate and execute laws to that end. . . ."

The right to separate into a political group for the purpose of making their votes effective was exercised by the party represented here by petitioners in 1872. They organized under the name "Mississippi Republican Party". It is only through use of the party name that its adherents, petitioners and those similarly situated, can hope to have an effective voice in the policies and legislation of their representatives in government. The right to a party name is so closely knitted with the right to vote that to speak of one without the other is, as a practical matter, to talk nonsense. When Chapter 458, Laws of 1950, as construed, robbed the members of petitioners' party, and the petitioners of their

party name, it robbed them of an effective vote in the affairs of government as surely as if it denied them, individually, of the right to cast their ballot. That right, this court has said, is capable of monetary valuation, and, it is submitted, that valuation of the rights of this large group represented by petitioners far exceeds the jurisdictional amount. The respondents have not denied it.

Petitioners, however, went further than the mere allegation of jurisdictional amount. They proved without contradiction, that in order to exercise their right to organize, which no one denies them, they would, if deprived of their present name, be forced to expend $15,000.00 to $16,000.00. This organization they now have; this the law in question would deprive them of. The expense of reorganization would be borne by petitioners and the members on whose behalf they sued, and exceeds, many times, the jurisdictional amount. *Ronzio* v. *Denver I.G.W.R. Co.*, 116 F. (2d) 604.

A name, because of its association, background, and the loyalties attaching thereto, may, of itself, involve more than the jurisdictional amount, even to a non-profit organization such as a church. *Purcell* v. *Summers*, 126 F. (2d) 390, Cert. Den. 317 U.S. 640, 87 L. Ed. 516, 63 S. Ct. 32. Certainly, where, as here, the name is that of a political party, involving the right to vote, not only in state elections, but for Congressmen and Senators as well, its value is incalculable. Note, too, that even if the party reorganizes under another name, the petitioners are not in *status quo* even though they have expended $15,000.00 to $16,000.00. They have still been deprived of the important thing—the name itself.

Petitioners believe that upon a hearing on the merits the court will agree that substantial federal questions are pre-

sented and that the district court had, and this court has, jurisdiction of the parties and of the subject matter.

Point III

The Decision in Hoskins et al. vs. Howard et al., 214 Miss. 481, 59 So. (2d) 263, Did Not Present the Issues Involved in This Case and the Petitioners Are Not Barred by Res Judicata Nor Estoppel.

The first serious question raised below, and here, is whether the decision of the Supreme Court of Mississippi in *Hoskins* v. *Howard*, 214 Miss. 481, 59 So. (2d) 263, Cert. Den., 344 U.S. 915, 97 L. Ed. 705, prevents the Federal District Court, and this Court, assuming jurisdiction under the Doctrine of *Res Judicata*. Of course the question of *res judicata* goes to the merits of the case and a motion to deal summarily therewith on such grounds will not ordinarily be entertained. *Huntington* v. *Laidley*, 176 U.S. 668, 44 L. Ed. 630, 20 S. Ct. 526; *Ill. Central R. Co.* v. *Adams*, 180 U. S. 28, 45 L. Ed. 410, 21 S. Ct. 251. Certainly such a motion should not have been considered in this case as the doctrine of *res judicata* does not, in fact or in law, apply.

The Circuit Court of Hinds County in deciding the issue of whether the party of the respondents was entitled to registration, having changed their name by resolution, discussed the constitutional aspects of Chapter 458, but only by way of construing it to determine the question at issue, namely whether the respondents were entitled to register. The Circuit Court held the respondents were not entitled to register, and, upon proof made, the petitioners were.

A. *Neither Party Could Appeal the Constitutional Question to the Supreme Court of Mississippi*

The defendants in *Hoskins* v. *Howard, supra*, respondents here, were not attacking the constitutionality of the Act

and could not raise the issue on appeal, the lower court having found it unnecessary to make a ruling thereon. The plaintiffs, petitioners here, having obtained all of the relief prayed for in the first count of their declaration, could not, under the rules of procedure in Mississippi, raise the question as appellees; they were not entitled to file any assignments of error. As is pointed out in 4 C. J. S., Sec. 183, p. 353:

> "Under statutes expressly or by necessary implication restricting the right of appeal to persons or parties aggrieved, or from decisions affecting a substantial right of appellant, to maintain appeal or writ of error in the person or party seeking review must not only be interested in the subject matter of the suit, but must also be injuriously affected or aggrieved by the judgment, order or decree complained of . . ."

The rule is followed in Mississippi. In *Davis et al* v. *Shemper*, 210 Miss. 201, 49 So. (2d) 253, the plaintiff moved to strike the answer of one of the parties, Mrs. Davis, denying personal liability. She obtained a favorable judgment on that issue, but assigned error. The Court on appeal said:

> "Technically, plaintiff should have taken a nonsuit as to Mrs. Davis on that issue instead of moving to strike her answer. However, the question is foreclosed here for these reasons: First, as a part of the oral motion to strike, counsel for plaintiff stated he was then abandoning any contention that Mrs. Davis was personally liable, and in a number of places in the record the court and counsel for both sides spoke of that action by plaintiff as a dismissal of any claim for personal liability against her; and, second, personal judgment was rendered in her favor, and, as to personal liability, there is nothing from which she can appeal. She won that contest."

The Supreme Court of Mississippi, in *Hoskins* v. *Howard*, 214 Miss. 481, 59 So. (2d) 263, clearly stated that the lower court had entered its order on the single ground that the respondents had changed their name and disqualified themselves from registering, as the following quotation shows:

> "The records show affirmatively that the organization represented by the appellants has been duly organized by precinct meetings, county conventions and state conventions. This does not seem to be seriously questioned by appellees. The learned trial court, however, found error of law upon the face of the record for the reason that the organization represented by appellants changed its name after the happening of the events required to be performed in 1948, *and upon this sole ground entered the order from which this appeal is prosecuted.*" (Emphasis added.)

Although the Supreme Court of Mississippi then discussed the constitutionality of the act, it was not mentioned in its order, which reads as follows:

> ". . . The judgment of the lower court will be reversed and a judgment will be here entered reinstating the registration of Mississippi Republican Party and cancelling the registration of Republican Party of Mississippi as ordered by the lower court.
>
> "Reversed and judgment here."

As the judgment of the Circuit Court of Hinds County was rendered on the "sole" ground that the organization represented by the appellants changed its name after the happening of the events required to be performed in 1948; as neither party to the action could raise the constitutionality of the act on appeal, and as a finding by the Supreme Court that the lower court erred in its "sole" finding would be sufficient to reverse the case, it would be necessary to charge the Supreme Court of Mississippi with

a violation of all known rules of law to hold that it decided and foreclosed the Constitutional Question. If it did decide the question when it was not properly before it, such a decision is advisory merely and the appellees here were not judicially estopped or bound by *res judicata* thereby. The following rules support these contentions:

B. *Constitutional Questions Will Not Be Decided Where Other Decisive Questions Are Raised*

As has been pointed out, the decision of the Circuit Court of Hinds County rested upon one issue only. The Supreme Court of Mississippi has often held that where a case can be resolved on a decisive point other than the constitutional question involved a decision of that question cannot properly be made.

In *Adams, State Revenue Agent* v. *Capitol State Bank*, 74 Miss. 307, 20 So. 881, the Court said:

> "We are asked by counsel on both sides to consider and decide the constitutional question which was argued before us. While the court would be pleased to comply with the request, yet we are constrained by our sense of duty to deny it . . . While the obligation rests upon the courts to fearlessly see that the constitution is preserved, still wisdom requires that they should proceed in such matters cautiously; and we think an act of the legislature should never be held to be violative of the fundamental laws unless the right of a litigant in the particular case before the court requires it to be done . . . It is both more proper and more respectful to coordinate department to discuss constitutional questions only when this is the very *lis mota. Thus presented and determined, the decision carries a weight with it to which no extra-judicial disquisition is entitled.* In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet, *if the record also presents*

some other clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable . . ." (Emphasis added)

The Supreme Court of Mississippi has consistently adhered to that principle. *Hendricks* v. *State,* 79 Miss. 368, 30 So. 708; *Maxey* v. *State,* 140 Miss. 570, 106 So. 353; *Hallum* v. *Mobile and Ohio Railroad Company,* — Miss. —, 24 So. 909; *Native Lumber Company* v. *Board of Supervisors,* 89 Miss. 171, 42 So. 665; *Dart* v. *City of Gulfport,* 147 Miss. 534, 113 So. 441; *Dunn* v. *Love,* 155 So. 331, 172 Misc. 342, 92 A. L. R. 1323; *Jackson County* v. *Worth,* 127 Miss. 814, 90 So. 588; *Nashville* v. *Adams County,* 123 Miss. 413, 86 So. 261.

The same rule obtains in the Federal Courts. *Blair* v. *United States,* 250 U. S. 273, 63 L. Ed. 979, 39 S. Ct. 468; *Risty* v. *Chicago, R. I. P. Railway Company,* 297 F. 710, C. C. A. 1924 affirmed in part and reversed in part, 270 U. S. 378, 70 L. Ed. 641, 46 S. Ct. 236; *Driscoll* v. *Edison Light and Power Company,* 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715; *Thompson* v. *Consolidated Gas Utilities Corpn.,* 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364.

As stated, the lower court did not pass on the issue of the constitutionality of the act called into question and neither party could complain on appeal as neither was prejudiced thereby. Ordinarily, the court will not pass on a question not presented on appeal by assignment of error. *Whittington* v. *H. T. Cottum Company,* 158 Miss. 847, 130 So. 745.

Despite the universal rule that a court will not decide a constitutional question until actually presented, *State* v. *Gilmer Grocery Company,* 156 Miss. 99, 125 So. 710; despite

the rule that a constitutional question will not be decided unless there is no escape therefrom, *Meek* v. *Humphreys County,* supra: despite the rule that a constitutional challenge will not be noticed when a cause is reversible on other grounds; *Maxey* v. *State, supra;* despite the holding in *Hoskins* v. *Howard, supra,* that the lower court erred in the "sole" findings upon which its judgment was based, the respondents ask this Court to foreclose the petitioners and deny them the right to exist because the Supreme Court of Mississippi *apparently* decided the question of constitutionality. The Supreme Court of Mississippi in its lengthy discussion on the validity of Chapter 458, Laws of 1950, was discussing a question not passed on by the court below, not presented on appeal and not necessary to the decision reached. It is submitted that in so doing, the court acted completely outside the several established modes of procedure as heretofore pointed out, and that the decision is advisory merely, and the petitioners should not be judicially estopped or bound by *res judicata.* When the court below found that the respondents had not organized their party as required by law, a condition precedent to registration under the act in question, the constitutional question raised only in the event the petitioners were wrong in their first count, became completely outside the issue. Proper procedure and rules of constitutional law demanded it be left alone in the lower court, and when another, decisive ground was found for reversal on appeal, the Supreme Court, too, was precluded from considering the act's constitutional aspect. In considering it, the Mississippi Supreme Court departed from the established modes of procedure governing the case and rendered or appeared to render a decision without proper attention having been given the question by the parties or the court, and a plea of *res judicata* thereon should not be sustained.

C. *Only Issues Developed Below May Be Considered On Appeal So As To Become Res Judicata Between The Parties*

Aside from the fact that the Three Judge Court which rendered the judgment vacated by this court did not sit as "simply another court" of the State of Mississippi, *Angel* v. *Bullington,* 330 U. S. 183, and aside from the fact that the relief sought in this case is essentially different from that in *Hoskins* v. *Howard,* it is submitted the doctrine of *res judicata* would not apply even in another suit in a state court for the reason that the decision of the constitutional question was not necessary nor in any way material to the judgment rendered. It was not argued or decided, nor was it necessary to the decision of the Supreme Court or properly before it. Its decision, therefore, cannot work an estoppel between these parties. Authority for this conclusion will be found in the following cases:

In *City of Biloxi* v. *Lowery,* 179 Miss. 364, 175 So. 200, the Supreme Court of Mississippi said:

> "It is averred in the answer to the cross-bill that the special improvements lien is void and has been from the beginning. No proof was made along this line, and that question was not developed before or considered by the Chancellor, and, we, of course, express no opinion on it . . ."

Again in *Alexander* v. *Woods,* 115 Miss. 164, 75 So. 772, a temporary injunction was dissolved with no damages for its issuance being awarded or considered although a written suggestion for damages had been filed. Suit was subsequently brought for damages and a peremptory instruction given the defendants on the ground that the question had been before the court and could have been litigated, and

was, therefore *res judicata*. On appeal the Supreme Court of Mississippi reversed, saying:

> "Two reasons are assigned in this court by the appellees as to why this was proper—the first being, that no damages were sustained by the issuing of the temporary injunction; second, that the dismissal of the case without awarding any damages was res judicata on the question of damages. The Chancellor did not pass upon the question of damages in that court; consequently it is not res judicata . . ."

It is true that courts have made general statements to the effect that those things which might have been litigated in a former suit as well as those things actually litigated are *res judicata* between the parties. As shown by the cases cited above, however, the rule is subject to exceptions, and, by "those things which might have been adjudicated" is meant those things necessarily involved in reaching a decision. *Mitchell* v. *State*, 179 Miss. 814, 176 So. 743; *Hardy* v. *O'Pry*, 102 Miss. 197, 214, 59 So. 73.

D. *Matters Immaterial To A Decision Are Not Res Judicata*

In other words, not every issue raised in a case, but only those actually or necessarily decided because material to the decision are *res judicata* between the parties. It is true, as heretofore stated, that at the former hearing between these parties in the state court, the petitioners pleaded in the alternative that Chapter 458, Laws of 1950 was unconstitutional in that it deprived them of their property without due process of law and for other reasons. It must be remembered, however, that the Circuit Court of Hinds County based its decision upon the "sole" ground that "they had changed their name from Independent Republican Party to Mississippi Republican Party . . . after the happening of the events required to be performed in

1948 . . ." After reaching that decision, the question of the constitutional validity of the act became immaterial and the order was entered by the Circuit Court without that court considering, much less determining, its validity.

In *Murphy* v. *McLaughlin*, 247 F. 385 (C. C. A., 5th Cir.), the court said:

> "The judgment of the court of appeals for the Parish of Orleans, which was affirmed by the Supreme Court, allowed the appellant interest. However, there was no contestation either in the Civil District Court or in the Court of Appeals, or in the Supreme Court, as to whether interest was properly allowable or not. It was not a controverted issue between the parties, before the rendition of judgment, and in no true sense can it be said to have actually litigated in the state court . . . If the allowance of interest was immaterial to the rights of the trustee in that case, it would seem that he was under no duty to appeal from the judgment in that respect . . .
>
> "Appellant's right to interest not having been actually a matter of contestation between the parties and not having been necessary to a decision to any of the issues involved in the state court litigation, we hold that the appellant's plea of res judicata failed . . . "

In *Millie Iron Mining Company* v. *McKinney*, 172 F. 42 (C. C. A., 6th Cir.), the court held:

> "Furthermore, there is another principle, before alluded to, which we regard as also applicable and controlling. *It is that matters immaterial or only incidental to the issues and judgment in one action, even though heard and passed upon, do not work estoppel in a subsequent action between the parties.*" (Emphasis added.)

The petitioners are in accord with the fundamental principle that litigation must come to rest, but respectfully urge

that their rights, so important to them and the hundreds they represent; rights going to the fundamental freedom of Americans to take a political stand and to make their political convictions effective, should not be cut off unless the controlling questions involved have, in fact, been litigated and finally and judicially settled. This, they contend, cannot be determined unless this court is able to consider the full record and not just the piece-meal portions the respondents have seen fit to put before it.

As this Court pointed out in *Russell v. Place*, 94 U. S. 606, 608, 609, 24 L. Ed. 214:

> "To render the judgment conclusive, it must appear *by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined—that is, that the verdict in the suit could not have been rendered without deciding that matter;* or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter." (Emphasis added.)

When the Supreme Court of Mississippi in the prior litigation between these parties found that the respondents had properly organized their party, that disposed of the case. The constitutionality of the act became at once immaterial to the judgment rendered and was not put at issue between the parties, and when it cannot be said that the rights of the parties depended upon a decision of that question, its decision was a mere gratuitous act by the court and was advisory merely, particularly where, as here, the lower court did not pass on the question. As was said in *Johnston* v. *Johnston*, 122 Fla. 372, 165 St. 638:

> "As to the questions brought up not ruled upon by the Chancellor, our former opinion was not conclusive, and we must decline to rule on them now, as the presumption is that the Chancellor will settle them cor-

rectly, and, *if they arise in further proceedings in the cause, anything said of them . . .*" (Emphasis added.)

The Supreme Court of Mississippi has in many, many cases carefully pointed out that the doctrine of *res judicata* rests on the ground that the matter sought again to be litigated has, in fact, been adjudicated and that "where it appears that the particular matter was not the essence of the cause" and did not require or receive the attention due it the rule does not apply. *Lorance* v. *Platt*, 67 Miss. 183, 6 So. 772; *Lion Oil Refining Company* v. *Crystal Oil Company*, 171 Miss. 36, 156 So. 593. No judgment is conclusive of any matter not required to support it. And "if the language of the judgment is general", it will be restrained to the issues made in the case and to the subject matter under consideration by the court. "Even if the judgment purports to affirm a particular fact or rule of law, yet, if such a fact or rule of law was immaterial and collateral to the issues in the case, and the controversy did not turn upon it, the judgment will not conclude the parties in reference thereto." *Thompson* v. *Hill*, 152 Miss. 390, 119 So. 320; 2 Freeman on Judgments, page 1474.

Certainly if a question has been litigated so as to be *res judicata* as to one party to the action, it applies with equal finality as to all parties. In the prior litigation between these parties, the only question decided was that the respondents here had not properly organized the "Mississippi Republican Party" under that name. Suppose, if the court will, that the respondents here had subsequently tried to register under the name "Independent Republican Party" by which they were properly organized. Upon refusal by the Secretary of State, would they have been barred by *res judicata* from questioning the constitution-

ality of the statute? Obviously they would not, the question not having been decided by the Circuit Court. The unconstitutionality of the act was not properly raised on appeal. As stated, the plaintiffs in that suit were granted the relief prayed; they had no right to appeal. The defendants had denied the act to be unconstitutional; they could not raise the question. It is true, the plaintiffs in that suit, petitioners here, pointed out in their brief that they had pleaded the constitutionality of the act below, but no authority was cited and no attempt was made to make an issue of it.

That Chapter 458, Laws of 1950 was unconstitutional was never put on issue between the parties at the former hearing, was immaterial to a decision in the case, and it is submitted, the decision rendered thereon in *Hoskins* v. *Howard, supra,* would not form a basis for a plea of *res judicata* even in the state courts of Mississippi.

If the constitutional question was not decided so as to bar the issue in the state courts, how much less should it operate in the federal courts which sit in such matters, not as another state court as was the case in *Angel* v. *Bullington,* 330 U. S. 183, but as federal courts, with the primary duty of guarding the rights guaranteed by the constitution?

In the former litigation, the petitioners were not seeking registration as such, but were seeking to have the registration of appellants cancelled because they had not complied with the registration laws. That was a war of extermination. This is a struggle for survival. In that fight the appellees were asking the court to determine whether respondents had complied with the law. The present issue is whether the law destroys petitioners constitutionally guaranteed rights.

In *Baltimore Steamship Company* v. *Phillips*, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069, this court said:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show . . . "

And in *Mercoid Corporation* v. *Mid-Continent Investment Company*, 320 U. S. 661, this court held:

> "The prior judgment is res judicata not as to issues which might have been tendered but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered' Cromwell vs. County of Sac, 94 U. S. 351, 24 L. Ed. 195."

In *Pueblo Savings & Trust Company* v. *Power*, 115 F. (2d) 69, (C.C.A. 7th Cir.) the court said:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive upon that question in another suit between the same parties. But to this operation of the judgment, it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there is any uncertainty in the former ruling as to what the court really decided, the whole subject matter of the action will be at large and open to a new contention. DeSollar vs. Hanscome, 158 U. S. 216, 221, 15 S. Ct. 816, 39 L. Ed. 956 . . ."

Petitioners do not contend that the federal courts should not give full faith and credit to a decision rendered by the Supreme Court of Mississippi upon issues properly presented to it and actually decided. They do urge that such force should be given the state court's decision only if the question was properly before it and actually and not just

apparently resolved. In this case in the former litigation, the only point decided was that respondents could change their name by resolution.

In *Aylesworth* v. *Gartiot County*, 43 F. 350, affirmed, 159 U. S. 250, the court said:

> "While we would desire to give full force to the opinion of the Supreme Court in this case, the point really decided was that the relator had not made title to these orders. There was no such construction given to the Drane law as will be binding upon this court, nor are there any reasons given in this opinion why a holder of these orders might not maintain suit upon them. . . . We do not understand the court to decide that an action could not be maintained against the county upon these orders, but only in its discretion it would refuse a writ of mandamus . . ."

As was said in *Mayor and Aldermen of the City of Vicksburg* v. *W. A. Hanson*, 231 U.S. 259, 58 L. Ed. 209:

> "The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties . . ."

And in the same case this court said:

> "We must therefore be careful to see, when the contention of former adjudication is made, that the matter was actually presented and decided, and the rights of the contending parties thereby concluded . . ."

The petitioners do not come before this court with a private lawsuit. They stand in the shoes of and seek to protect the rights of thousands of members of a great and organized political party condemned to die, not because of any wrong it has done, but simply because, though first in time in the use of its name, it was last in time in the "footrace" to the State Capitol. The interests sought to be protected

are public interests. Certainly this is not a case for the rigid application of legal principles to deny protection to those rights.

As was said in *Virginian Railroad Company* v. *System Federation No. 40*, 300 U.S. 515, 552, 57 S. Ct. 592, 601, 81 L. Ed. 789:

> "Courts of equity may and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Finally Appellees submit that the doctrine of *res judicata* is not to be rigidly applied so as to deny justice and equity between litigants, but, as was said in *Holmes* v. *Donald*, 84 F. (2d) 188 (C.C.A., 5th Cir.), by Judge Hutcheson, speaking for the Court:

> "Res judicata is a principle of peace, it operates to prevent the retrial of issues, facts, and actions once tried and determined on their merit. It is not a procrustean formula to be rigorously and rigidly applied, to give substance to what was merely an appearance of finality, and thus cut off actions and defenses not really, but only apparently, determined . . ."

Petitioners respectfully urge that the situation here is very amply described in Judge Hutcheson's words quoted above. The constitutionality of Chapter 458, Laws of 1950, was not considered by the Circuit Court of Hinds County and was not before the Supreme Court of Mississippi on appeal in *Hoskins* v. *Howard, supra.* That court construed the act, and as construed it violates fundamental rights of the petitioners and those on whose behalf suit was brought.

From the decision of the Supreme Court of Mississippi rendered in *Hoskins* v. *Howard*, 214 Miss. 481, 59 So. (2d) 263, counsel then representing petitioners undertook to pro-

ceed to this court by way of certiorari. As the record will reveal, because of illness of petitioner's counsel, certiorari was denied, 344 U.S. 915, 73 S. Ct. 334, 97 L. Ed. 705. Perhaps the petitioners were then brought within the purview of the doctrine of *res judicata* in its technical sense. When, however, consideration is given the rules which requires actual litigation of an issue before the doctrine becomes applicable; when, as here, the issues were not, in fact, litigated, and when the fundamental rights of a vast number of citizens are at stake, it is submitted the policy of ending litigation is outweighed by the urgency of showing the truth.

Conclusion

Petitioners believe that upon a full hearing on the merits of this cause, this Court will reinsate and affirm the judgment of the District Court for the reasons set forth in the foregoing petition, and, therefore, respectfully urge that a rehearing be granted.

Respectfully submitted,

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Of Counsel for Petitioners.

Certificate

I, Perry W. Howard, Sr., of counsel for petitioners, hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for purposes of delay.

PERRY W. HOWARD, SR.,
Of Counsel for Petitioners.

Certificate of Service

I, the undersigned Perry W. Howard, Sr., one of the attorneys of record for petitioners, hereby certify that I have this day served the above and foregoing petition for rehearing on the respondents by mailing a true and correct copy thereof by the United States mail, postage prepaid, to Lester E. Wills, attorney of record for respondents, at his last known mailing address at Box 566, Meridian, Mississippi.

PERRY W. HOWARD, SR.,
Of Counsel for Petitioners.

YOUNG and DANIEL,
Counsel for Petitioners (Appellees).